UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: ARC AIRBAG INFLATORS PRODUCTS LIABILITY LITIGATION	MDL No. 3051 Case No. 1:22-md-3051-ELR Hon. Eleanor L. Ross **DEFENDANTS' RESPONSE TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY**

Plaintiffs' Notice of Supplemental Authority (Dkt. 300) about *Sowa v. Mercedes-Benz Group AG*, No. 1:23-cv-636 (N.D. Ga. Dec. 31, 2024), misconstrues parts of Judge Geraghty's opinion, ignores or relegates to footnotes the parts of the opinion favoring Defendants, and ignores important differences between *Sowa* and this multi-district litigation.

First, Plaintiffs mistakenly suggest that *Sowa's* holding on standing under Article III favors them. Dkt. 300 at 1. But the portion of the opinion they cite addressed a different question than the one this Court is facing. The cited portion addressed whether owners of one Mercedes model had standing to sue on behalf of owners of different models with the same alleged defect. Defendants' point here, in contrast, is that Plaintiffs from one state cannot raise claims under the laws of other

states. *See* Dkt. 181 at 6.[1] *Sowa* addressed this question too, and it dismissed the pertinent claims—just as Defendants ask the Court to do here. *See* Dkt. 300-1 at 6 & n.5 (dismissing Florida claims where Florida plaintiff died, leaving the court with "no jurisdiction to entertain any Florida-related claims"). Plaintiffs never acknowledge, much less explain away, this ruling.

Second, Plaintiffs suggest that *Sowa's* choice-of-law holding as to the nationwide fraud and unjust enrichment claims favors them. Dkt. 300 at 1-2. But *Sowa* is not a multi-district litigation and so does not address the choice-of-law issues the Court must grapple with here. *Sowa* was obliged to follow Georgia's unique and archaic choice-of-law rules, which have been criticized as "uncommonly silly, wholly disingenuous . . . indefensible, singularly unappealing, and a covert tool for engineering a choice of Georgia law." *See* Dkt. 300-1 at 31 & n.15. Here, in contrast, the Court must apply the choice-of-law analysis that would be applied by each transferor court, most of which are not in Georgia, because this is an MDL. *See* Dkt. 181 at 8–9.

Third, Plaintiffs relegate to a footnote that *Sowa* dismissed all express warranty claims because the plaintiffs failed to seek repairs or replacements within

[1] Moreover, with respect to the Tier 1 Supplier Defendants, the point is also that owners of a vehicle containing one Supplier's airbag module do not have standing to sue *all* Tier 1 Suppliers, including those that did not manufacture the module in their vehicles. *See* Dkt. 178-1 at 17-18.

the warranty period. Dkt. 300 at 4 n.2. Plaintiffs try to distinguish *Sowa* by saying they oppose Defendants' reliance on the actual warranties. That is wrong for reasons already thoroughly briefed by multiple parties. *See*, *e.g.*, Dkts. 275 at 12; Dkt. 277 at 4. *Sowa* also rejected Plaintiffs' arguments about why the court should excuse their failure to present their vehicles for repair. *Compare* Dkt. 221 at 16-19, *with* Dkt. 300-1 at 47-52 (noting Mercedes had no opportunity to repair and that time-limited warranties do not protect buyers against latent defects; rejecting futility argument).

Fourth, with respect to the implied warranty claims, Plaintiffs' reliance on the privity holdings in *Sowa* is misplaced. For example, Plaintiffs never raised the purported third-party beneficiary exception in opposition to Defendants' argument that New York's implied warranty claims require privity, *see, e.g.*, Dkt. 221 at 19 & App'x A, Chart 1. As a result, they have waived this point. *See Moore v. BMW of N.A., LLC*, 2021 WL 614920, at *2 (N.D. Ga. Feb. 17, 2021). Plaintiffs also failed to oppose Defendants' argument that Virginia requires privity, *see* Dkt. 181 at 14; 221 at 19-20, so it too is waived. And Plaintiffs ignore that *Sowa's* holding under California law related solely to the Song-Beverly Act, which does not require privity, Dkt. 300-1 at 74, but Plaintiffs are also asserting an implied warranty claim under § 2314 of the California Commercial Code, which does have a privity requirement. Dkt. 249 at 10.

Fifth, with respect to its interpretation of how Rule 9(b) applies in the "omissions" context, Dkt. 300 at 4-5, *Sowa* is out of step with Eleventh Circuit precedent, this Court, and other courts in this District. Whether brought under an affirmative misrepresentation or an "omissions" theory, claims sounding in fraud must "set forth (1) precisely what statements or omissions were made in which documents or oral representations; (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) them; (3) the content of such statements and the manner in which they misled the plaintiff; and (4) what the defendant obtained as a consequence of the fraud." *FindWhat Investor Group v. FindWhat.com*, 658 F.3d 1282, 1296 (11th Cir. 2011); *accord In re HD Supply Holdings, Inc. Sec. Litig.*, 341 F. Supp. 3d 1342, 1351 (N.D. Ga. 2018) (Ross, J.); *Edwards v. Wisconsin Pharmacal Co., LLC*, 987 F. Supp. 2d 1340, 1346 (N.D. Ga. 2013).

Sixth, Plaintiffs say that *Sowa* upheld the unjust enrichment claims. Dkt. 300 at 2. Wrong again. All unjust enrichment claims were dismissed because, as in this case, a contract governed the subject matter in dispute. Dkt. 300-1 at 116; Dkt. 181 at 42-43.

Seventh, Sowa's rejection of Mercedes' "shotgun pleading" argument was premised on the finding that plaintiffs had plausibly pleaded that the U.S.-based

defendant was an agent of its German parent. Dkt. 300-1 at 42. No such allegations appear in the Amended Complaint here.

Finally, Plaintiffs ignore important differences between *Sowa* and this consolidated litigation. *Sowa* deals with two related defendants, class members from 17 states, and a single complaint that consolidated a handful of cases filed in this District and that, for the most part, raises questions of Georgia law. *See id.* at 36-39, 57-58, 98. This centralized litigation involves more than 100 Plaintiffs from 36 states. Those Plaintiffs initially asserted claims in federal courts around the country, and they are now pursuing claims under the laws of all 50 states and the District of Columbia. Rather than suing two related defendants, they are suing numerous, largely unrelated defendants—including automotive suppliers that have raised arguments that were never raised in *Sowa*. And in contrast to this case, in *Sowa* many owners of class vehicles, including some named plaintiffs, claim they actually experienced the alleged defect. Dkt. 300-1 at 45, 86. Not a single Plaintiff in this case has made such an allegation.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing document has been prepared with Times New Roman 14-point font, one of the font and point selections approved by Local Rule 5.1.

/s/ Eric S. Mattson

CERTIFICATE OF SERVICE

I certify that on February 7, 2025, a copy of the foregoing Defendants' Response to Plaintiffs' Notice of Supplemental Authority was served electronically through the Court's electronic filing system on all parties appearing on the Court's ECF service list.

/s/ Eric S. Mattson